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No. 92-2062

In The

Supreme Court of the United States

October Term, 1993

F.P. CORPORATION,

Petitioner,

vs.

TWIN MODAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals properly concluded, based on applicable ICC regulations, that Petitioner had no effective mileage rate on file at the ICC upon which to base its undercharge claims?

LIST OF PARTIES

Petitioner, F.P. Corp (FP), was, during the relevant time herein, operating as a common and a contract carrier licensed by the ICC. Respondent, Twin Modal (TM), at all relevant times was (and still is) an ICC licensed property broker.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 989 F.2d 285, and reprinted at Petitioner's Appendix B. The order and decision of the United States District Court for the District of Minnesota (Rosenbaum, J.) granting summary judgment for Respondent, is unreported and is reprinted in Petitioner's Brief as Appendix A.

JURISDICTION

Petitioner's statement of the Jurisdictional basis for this case is accurately set forth in its Petition. This Brief in Opposition to the Petition has been timely filed and served pursuant to Supreme Court Rule 15.

PRINCIPAL REGULATIONS INVOLVED

49 C.F.R. § 1312.30(c)(1)

> "*Determination of distances.* (1) A tariff containing distance rates shall contain provisions for the determination of distances by –
>
> (i) Publishing the distances between all locations covered by the distance rates in the tariff;
>
> (ii) Referring to a map(s) attached to the tariff; or
>
> (iii) Referring to a distance guide(s) . . . "

49 C.F.R. § 1312.27(e)

> "*Participation in governing publications.* Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules, etc.), shall also participate in those governing separate tariffs, . . . "

49 C.F.R. § 1312.4(d)

> "*Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of

attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law . . . "

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case as set forth on Page 3 of its Petition. Additionally, the following is pertinent to the court's consideration:

This case arose out of a lawsuit commenced by F.P. Corporation (hereafter FP), an ICC Licensed Motor Common Carrier and an ICC Licensed Motor Contract Carrier in August 1991, seeking to collect "undercharges" under the Filed Rate Doctrine contained in 49 U.S.C. § 10761, and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), from Twin Modal, Inc. (hereafter TM), a licensed ICC property broker, relating to approximately 81 shipments of freight transported by FP between August of 1988 and June of 1990. The suit was filed in United States District Court, District of Minnesota.

Prior to the commencement of business between the parties, a Contract of Carriage was executed by them, which was intended to memorialize their relationship. They conducted their business under the terms of their contract. In response to FP's lawsuit, TM raised the following defenses: The Contract and the contract carriage relationship between the parties constituted a complete bar to Plaintiff's action; Defendant's contract complied with the requirements of 49 C.F.R. § 1053.1; as a result of an audit of FP's freight bills and bills of lading, the "filed rates" FP sought to collect were void under 49 C.F.R.

§ 1312.4(d); the rates sought to be collected by FP were "unreasonable" within the meaning of 49 U.S.C. § 10701; TM, as a property broker, was not a consignee or consignor of the shipments and was, therefore, not liable; the statute of limitations contained in 49 U.S.C. § 11706 barred certain of the claims made by FP; TM also counterclaimed asserting violations of the Uniform Deceptive Trade Practices Act. On Motion for Summary Judgment, the U.S. District Court, Minnesota, ruled, on May 12, 1992, in favor of TM, upholding one of its defenses, namely, that FP had failed to comply with 49 C.F.R. § 1312.4(d). The U.S. District Court did not rule on any of the other defenses raised by TM. The decision of the District Court was affirmed by the Eighth Circuit Court of Appeals on March 26, 1993 (989 F.2d 285 (1993)), based on the application of 49 C.F.R. § 1312.4(d), holding that FP's tariff never was effectively filed with the ICC, even though Twin Modal again argued the contract carriage defense.

It is uncontroverted that FP, as a common carrier, was subject to the following ICC Regulations:

Section 1312.30 of Title 49 C.F.R. provides that when a carrier chooses to publish mileage rates rather than rates stated in cents per 100 lbs., it is given three choices for publishing distances to be applied to mileage rates. Sub-section 1312.30(c)(1) requires either (i) publishing the distances between all points for which mileage rates are published, (ii) attaching a map to the tariff or (iii) referring to a filed distance guide such as the Household Goods Carrier Bureau Mileage Guide. § 1312.27(e) requires carriers that refer to a third party's tariff also *participate* in that tariff. Finally, 49 C.F.R. § 1312.4(d)

requires that participation be evidenced by execution of a concurrence or power of attorney and that failure to do so makes tariffs void as a matter of law.

In the instant case, FP did not "participate" in the Household Goods Carrier Bureau Mileage Guide as required under 49 C.F.R. § 1312.4(d)

SUMMARY OF ARGUMENTS

I. The legal basis for the decision in the Eighth Circuit, as well as its factual background are substantially dissimilar to the Third and Fifth Circuit cases (which reach the same conclusion), and the D.C. Circuit, which reaches the opposite conclusion, making the instant case poorly representative of the cases involving the issue presented.

II. Since the central issue involves the ICC's interpretation of its own regulations, *Overland Express, Inc. v. ICC*, 92-1037 (D.C. Cir. June 22, 1993), is the appropriate case for the Supreme Court to consider.

III. The issues raised by Petitioner are substantially broader than those litigated at the Eighth Circuit and fail to deal with the central issue, i.e., the ICC's interpretation of its own regulations.

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION BELOW IS NOT REPRESENTATIVE OF THE CASES INVOLVING THE ISSUE PRESENTED.

A. Legal Basis For Decision: The Eighth Circuit in the instant case, as well as in the companion case, that it follows *Atlantis Express, Inc. v. Associated Wholesale Grocers*, 989 F.2d 281 (8th Cir. 1993) (Atlantis) sustained the ICC's application of 49 C.F.R. § 1312.4(d) on the grounds that the carrier's tariff(s) was determined not to be effectively filed because the carrier failed to comply with the power of attorney requirement. Thus, in each case the court held that the carrier had no basis for asserting undercharges and denied its claims. The Eighth Circuit is the only U.S. Circuit Court of Appeals which has rendered its interpretation of the application of 49 C.F.R. § 1312.4(d) in that manner. While similarly finding no basis for the carrier's undercharge claims, *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), cert. den., 113 S.Ct. 979 (1993) (Freightcor), and *Security Services, Inc., f/k/a RISS International Corp. v. K-Mart*, No. 92-1833 (3d Cir. June 13, 1993) (K-Mart), each held that the carrier mileage tariffs were effective but properly voided under 49 C.F.R. § 1312.4(d) pursuant to *I.C.C. v. American Trucking Ass'n., Inc.*, 467 U.S. 354, rehearing den., 468 U.S. 1225 (1984) (ATA). The ultimate conclusions reached in the instant case, *Atlantis, Freightcor* and *K-Mart*, are all consistent, but for different reasons. The recent decision of the D.C Circuit in *Overland Express, Inc. v. I.C.C.*, 92-1037 (D.C. Cir. June 22, 1993) (*Overland*) 1993 Westlaw, 213925 (6/22/93), held that the

ICC's application of 49 C.F.R. § 1312.4(d) constituted a retroactive rejection of an effectively filed tariff that contravened *ATA* and was beyond its remedial authority. *Overland* is directly contrary to the Fifth and Third Circuit cases, but not the Eighth. Thus, granting the Petition for Certiorari based upon the Eighth Circuit decisions would be inappropriate.

B. Factual Basis for Decision: The instant case, *F.P. Corp. v. Twin Modal,* involved a claim by a common and contract carrier, which had ceased conducting business but had not filed bankruptcy, asserting undercharges against Twin Modal, an ICC Licensed Property Broker, who was *not* a shipper. The other cases cited above relating to the application of 49 C.F.R. § 1312.4(d) do not involve such a fact pattern. They involve typical fact patterns where bankrupt carriers (and their trustees) assert undercharge claims against shippers. While there are thousands of undercharge cases pending involving the application of 49 C.F.R. § 1312.4(d), very few of them involve claims by non-bankrupt carriers against ICC property brokers. Granting of the petition herein, regardless of the Court's decision on the merits, would create significant confusion and not achieve the desired harmony of the decisions among the circuits because there is no underlying decision, either by the U.S. Federal District Court in Minnesota, or the U.S. Court of Appeals in the Eighth Circuit relating to Twin Modal's liability as a "shipper". In summary, the instant case is a poor representative of the great number of cases involving the application of 49 C.F.R. § 1312.4(d).

II. SINCE THE CENTRAL ISSUE INVOLVES THE ICC'S INTERPRETATION OF ITS OWN REGULATION, *OVERLAND* IS THE APPROPRIATE CASE FOR THE SUPREME COURT TO CONSIDER.

It is not disputed that *K-Mart* and *Freightcor* are contrary to *Overland* which received the ICC's interpretation and application of 49 C.F.R. § 1312(d), in *Jasper Wyman & Sons*, Petition for Declaratory Order, 8 ICC2d 246 (1992). The ICC is the respondent in the D.C. U.S. Circuit Court of Appeals case. The ICC has publicly announced that it is filing with the D.C. Court a Petition for Rehearing, suggesting rehearing en banc to review *Overland*.

Regardless of the decision on the Petition for Rehearing, the non-prevailing party will undoubtedly file a Petition for Certiorari in order to bring the case before U.S. Supreme Court. That is the case of industry-wide significance which would be appropriate for the Supreme Court to decide, since the ICC is the primary interested party and governmental agency whose decisions are fundamentally at issue. Also, the fact pattern in *Overland*, is more typical of the thousands of other undercharge cases that have been decided (or are pending) based on the ICC's application of 49 C.F.R. § 1312.4(d), where a bankruptcy trustee asserts undercharge claims against a *shipper*. It should be noted that in neither of the Eighth U.S. Circuit cases was the *authority* of the ICC to adopt such a regulation questioned. Thus, until a decision on the Petition for Rehearing in *Overland* is rendered, the grant of the Petition for Certiorari in the instant case would be premature. This Court may find it helpful to independently obtain the views of the U.S. Government and the ICC on this issue before rendering its decision herein.

III. RESPONSE TO PETITIONER'S ARGUMENTS

A. Petitioner's characterization of the Question Presented for Review, and its claim (Petitioner's Brief at p. 5, ¶ 3) that the decision below *(F.P. v. Twin Modal)* was inconsistent with the described statutory plan, " . . . because it fails to give legal effect to a filed tariff, as required by 49 U.S.C. § 10761(a).", *assumes* the answer to the central litigated issue. That issue is, does the application of 49 C.F.R. § 1312.4(d) prevent a tariff from becoming "effectively filed"? The Eighth Circuit Court, in the instant case said,

> " . . . We agree with the District Court, that F.P.'s tariff was never effectively filed with the ICC and, thus, FP is barred from collecting the alleged undercharges from Twin Modal. See *Atlantis Express v. Assoc. Wholesale Grocers*, No. 92-1771 (8th Cir. 3/26/93)."

(Petitioner's Brief at p. 11-A). The Court in *Atlantis* acknowledging deference to the ICC's interpretation of its own regulations (p. 7) similarly held that the Atlantis Express tariff was not effectively filed. In neither of the Eighth Circuit cases did the Court reach the issue of whether the ICC had exceeded its statutory authority. That issue was not raised. (p. 7) Since the Eighth Circuit opinions held that the tariff at issue was "not effectively filed", neither decision examines the criteria for dealing with effectively filed tariffs, as perscribed in *ATA*. The entire statutory plan, as stated by Petitioner in its Brief, deals with the issue of whether the ICC has authority to avoid tariffs *after* they have been effectively filed.

In summary, Section 1.A of Petitioner's Brief introduces issues which are substantially broader in scope than those actually litigated and decided by the Eighth Circuit Court of Appeals. Petitioner seeks to include in the requested review, all issues raised by the decisions in the Eighth, Fifth, Third and D.C. Circuit Courts of Appeals. As indicated above, only the Fifth and Third Circuits decisions, *Freightcor* and *K-Mart may* be contrary to *Overland* depending on the decision for the Petition for Rehearing en banc in the D.C. Court of Appeals.

B. Petitioner failed to discuss, based on the facts of this case, the regulatory framework in which the Eighth Circuit (and the ICC) rendered its decisions. § 1312.30 of Title 49 C.F.R. provides that when a carrier chooses to publish mileage rates, rather than rates stated in cents per hundred pounds, it is provided three choices for publishing distances to be applied to the mileage rates. Subsection 1312.30(c)(1) requires either (i) publishing the distances between all points for which mileage rates are published, or (ii) attaching a map to the tariff, or (iii) referring to a filed distance guide, such as the Household Goods Carrier Bureau Mileage Guide referred to by most common carriers, as FP did in the instant case. 49 C.F.R. § 1312.27(e) requires that carriers who refer to a third party's tariff must also *participate* in that tariff. No claim has been made that the ICC did not have authority to adopt that regulation. Additionally, 49 C.F.R. § 1312.10(b) requires carriers to execute a power of attorney to the publisher of a referred-to tariff in order to accomplish the desired participation. No attack has been made on the ICC's authority to adopt such a regulation. Finally, 49 C.F.R. § 1312.4(d) provides that, " . . . Tariffs are void as a

matter of law . . . " absent effective powers of attorney. Thus, in order to render the rate "effective", the tariff regulations require compliance with two elements, namely, the mileage rate and the distances between desired origins and destinations must be properly met in order to be *effective*. Effectiveness is dependent on *participation* as required by the regulation. Without *participation*, tariff users will not be able to determine the freight charges applicable to their shipments. It should be pointed out that the *only* ICC Regulation which provides that failure to comply with it voids a tariff "as a matter of law" is § 1312.4(d). None of the other applicable regulations so clearly state on their face the consequences of noncompliance.

In both of the Eighth Circuit cases, the complaining carriers did not dispute that they were *not participants* in the Mileage Guide. The HGB Mileage Guide, 100-B, stated, in relevant part,

"NOTE: This Mileage Guide may not be employed by a carrier as a governing publication for the purpose of determining interstate transportation rates based on mileage or distance, unless carrier is shown as a participant in the above-named tariff . . . " Thus, even the essential tariff on which the claimants relied in each of the Eighth Circuit cases clearly stated that without "participation", it could not be used. Thus, Petitioner seeks review of the decision in the instant case which: (1) made no *ATA* analysis; (2) upheld the ICC's interpretation of the effect of 49 C.F.R. § 1312.4(d); (3) was based on facts significantly different from those in *Freightcor*, *K-Mart* and *Overland* and still claims that despite its admitted violation of

the Regulations, as well as the Mileage Guide, that it should be allowed to collect.

CONCLUSION

For the reasons set forth above, the Petition of F.P. Corporation should be denied, and the Writ of Certiorari should not be issued to the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted

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